



The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 04-111

January 31, 2005

Petition of Bay State Gas Company for Approval of its Gas Sales Agreement with BP Canada Energy Company pursuant to G.L. c. 164, § 94.

HEARING OFFICER RULING ON MOTION FOR CONFIDENTIAL TREATMENT

I. INTRODUCTION

On November 24, 2004, Bay State Gas Company ("Bay State") filed with the Department of Telecommunications and Energy ("Department") a petition for approval of a gas sales agreement ("GSA") with BP Canada Energy Company ("BP"). Bay State simultaneously filed a motion seeking confidential treatment ("Motion I") of the GSA, two related agreements, an Agency Agreement ("AA") and a Management Services Agreement ("MSA"), responses to the Request for Proposals for gas supply ("RFP") and Bay State's evaluation of these responses. On January 25, 2005, Bay State filed responses to the Department's First Set of Information Requests, along with a motion seeking confidential treatment of certain responses ("Motion II"). Bay State provided redacted documents and responses to the information requests for the public docket. There are no intervenors in this proceeding.

II. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, [or] confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Standard of Review for Electric Contracts,

D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (protecting from disclosure electricity contract prices, but not other contract terms, such as the identity of the customer); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not and will not be granted automatically by the Department. A party's willingness to enter into a non-disclosure agreement with other parties does not resolve the question of whether the response, once it becomes a public record in one of our proceedings, should be granted protective treatment. In short, what parties may agree to share and the terms of that sharing are not dispositive of the Department's scope of action under G.L. c. 25, § 5D, or c. 66, § 10. See Boston Edison Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

III. BAY STATE'S MOTION FOR CONFIDENTIAL TREATMENT

Bay State seeks confidential treatment of pricing provisions as well as other competitively sensitive and proprietary information whose disclosure would allegedly damage its ability to secure least-cost gas for its customers (Motion I at 1, 3; Motion II at 1, 5).

Specifically, Bay State seeks to protect: (1) the pricing provisions of the GSA; (2) the terms of the AA and MSA; (3) the identity of the bidders and proposed pricing provisions in the RFP responses; (4) evaluative rankings of the RFP responses; and (5) its SENDOUT Model Total

Portfolio Analysis (Motion I at 2). Bay State also seeks to protect its responses to DTE1-1(b), DTE 1-4, DTE 1-8(a-c) and DTE 1-9 (Motion II at 3). Bay State asserts that public disclosure of this information could weaken its bargaining position in future gas supply negotiations and “chill participation” in and “otherwise compromise the integrity of” future RFPs for Bay State’s supply and management services requirements (Motion I at 4-8; Motion II at 4-5). Bay State contends that these materials are not and will not be available in the public domain (Motion I at 1; Motion II at 1).

IV. ANALYSIS AND FINDINGS

Bay State bears the burden of proving that the information for which protection is sought constitutes trade secrets, or confidential, competitively sensitive, or proprietary information. G.L. c. 25, § 5D. Contrary to Bay State’s assertions, blanket protection of the GSA, MSA, and AA is not warranted as the majority of their terms and conditions became part of the public domain when other northeast local distribution companies, with whom Bay State joined for competitive solicitations of these agreements, submitted them to the Department in support of the approval of similar GSAs. See Berkshire Gas Company, D.T.E. 04-35 (2004) (providing redacting versions of GSA, MSA and RFP-related information); KeySpan Energy Delivery New England, D.T.E. 04-29 (2004). Notwithstanding, I find that Bay State has met its burden as to certain information whose public disclosure could expose Bay State to competitive disadvantage. Specifically, Bay State has shown that various pricing provisions and other competitively sensitive and/or proprietary information are not readily available to the industry and that the information in question is valuable. See, e.g., Berkshire Gas Company,

D.T.E. 04-35 (granting confidentiality for comparable provisions); KeySpan Energy Delivery New England, D.T.E. 04-29; Bay State Gas Company, D.T.E. 02-52 (2002).

In seeking protective treatment, Bay State proposes various sunset provisions, ranging from a matter of years to in perpetuity. The risk of competitive harm from public disclosure of these confidential materials, however, decreases with time as the information becomes stale. Accordingly, confidential treatment of these materials will terminate on March 31, 2007, the date upon which the proposed GSA ends, or at such time as the Federal Energy Regulatory Commission (“FERC”) releases this information for public dissemination, whichever event first occurs. Bay State is required to inform the Department if it becomes aware that FERC has released this information to the public. Prior to that time, Bay State may renew its request for confidential treatment, accompanied by proof of the need for such protection.

V. RULING

In sum, Motions I and II are granted in part and denied in part. Specifically, the Department will protect from public disclosure until March 31, 2007, the terms and information identified below by exhibit and information request. Within ten days of the date of this Ruling, Bay State must file, consistent with this Ruling, redacted copies of these exhibits and information requests for the public docket.

Proposed Exh. FCD-1- GSA:

Redact Section 1.1 - definition of “Contract Price.”

Proposed Exh. FCD-2- AA:

No protection.

Proposed Exh. FCD-3- MSA:

Redact Section 5 - the remainder of the first sentence following the phrase “a fee equal to.”

Proposed Exh. FCD-6- GSA RFP responses:

Redact pricing, competitively sensitive and other proprietary information only.

Proposed Exh. FCD-7- Summary and Analysis of GSA RFP responses:

Redact names of bidders.

Proposed Exh. FCD-11- Non-Price Scoring of GSA RFP results:

Redact actual scores only.

Proposed Exh. FCD-12- Price Scoring of GSA RFP results:

Protected in entirety.

Proposed Exh. FCD-15- Refresher GSA RFP responses:

Redact names of bidders.

Proposed Exh. FCD-17- SENDOUT Model Total Portfolio Analysis:

Protected in entirety.

Proposed Exh. FCD-19- Actual MSA RFP responses:

Redact pricing, competitively sensitive and other proprietary information only.

Proposed Exh. FCD-20- Bid Price Analysis of MSA RFP responses:

Protected in entirety.

DTE 1-1(b)

Protected in entirety.

DTE 1-4

No protection.

DTE 1-8(a-c)

Protected in entirety.

DTE 1-9

Protected in entirety.

VI. APPEAL

Under the provisions of 220 C.M.R. § 1.06(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. A written response to any appeal must be filed within two (2) days of the appeal.

_____/s/_____
Shaela McNulty Collins
Hearing Officer